MOTION FILED
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No. 02-1662

In the
Supreme Court of the United States

PETER J. LOEWENSTEIN and HELEN LOEWENSTEIN,

Petitioners,

v.

CITY OF LAFAYETTE, a Municipality,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully moves this Court for permission to file the attached brief amicus curiae in support of Petitioners Peter J. and Helen Loewenstein. Written consent for amicus participation in this case was granted by counsel of record for Respondent City of Lafayette. Counsel for Petitioners did not respond to a request for written consent.

Pacific Legal Foundation (PLF), the largest and most experienced nonprofit public interest law foundation of its kind, has been litigating in support of the rights of individuals to make reasonable use of their private property for over 30 years. PLF attorneys have argued before this Court on several occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has also participated as amicus curiae in nearly every major real property takings case heard by this Court in the last two decades, including the recent case of *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 533 U.S. 948 (2001).

PLF believes that its litigation experience will provide an additional, valuable viewpoint on the issues presented in this case. Specifically, PLF seeks to augment the arguments of the Petitioners by clarifying just how far the decision below goes in isolating California from this Court's takings jurisprudence. PLF contends that the decision below is in direct conflict with this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), as affirmed by *Tahoe-Sierra*. California takings jurisprudence denies compensation for the effective period of a regulation that is invalid and that therefore fails to advance

legitimate state interests. Essentially, the opinion of the California Court of Appeal demonstrates that temporary takings are nonexistent in California. PLF's amicus brief also seeks to direct this Court to lower court decisions, not cited by Petitioners, that are in conflict with the decision by the California Courts.

For the foregoing reasons, Amicus Pacific Legal Foundation respectfully requests that this Court GRANT its motion for leave to file the attached brief.

DATED: July, 2003.

Respectfully submitted,

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QUESTION PRESENTED

Whether a state court may avoid the duty, recognized by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987), to award just compensation for a temporary regulatory taking by characterizing the taking as a "normal delay" in the land use process?

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTRODUCTION[1]

This case confronts the Court with an understanding of federal constitutional law that redacts the doctrine of temporary regulatory takings in California, and in so doing directly flouts this Court's jurisprudence. Through litigation, the Loewensteins, owners of two small, adjacent parcels, established that the City of Lafayette illegally prevented them from obtaining a lot-line adjustment that would have allowed them to make economically beneficial use of their land. A trial court subsequently ruled that the City's actions caused a compensable permanent taking of that property, which prompted the City to grant the disputed lot-line adjustment.

Given the City's reversal, the California Court of Appeals concluded that the landowners retained only a temporary regulatory takings claim. But, relying on the California Supreme Court's decision in *Landgate, Inc. v. California Coastal Commission*, 17 Cal. 4th 1006 (1998), the court held that the Loewensteins could not obtain compensation for the temporary imposition of the land use restriction, even though the restriction was held by the trial court to amount to a permanent regulatory taking if left in place. *See Loewenstein v. City of Lafayette*, 103 Cal. App. 4th 718, 729 (2002). In the lower court's view, loss of use and value prior to and up to invalidation of the City's illegal action was merely the product of a "normal" and, thus, noncompensable "delay" in the development process.

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Under this understanding of the Just Compensation Clause, there is no meaningful compensatory remedy in California for temporary regulatory takings. This is, however, the very understanding that this Court rejected over fifteen years ago in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 322 (1987) (holding that "invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy"). This Court should not allow California to unilaterally turn back the constitutional clock for millions of property owners by ignoring the clear commands of the United States Supreme Court.

ARGUMENT

THE DECISION BELOW RAISES THE IMPORTANT QUESTION OF WHETHER A LOCAL GOVERNMENT MUST PAY JUST COMPENSATION FOR A TEMPORARY REGULATORY TAKING OF REAL PROPERTY WHEN THE REGULATORY ACTION IS RESCINDED AFTER A JUDICIAL DETERMINATION THAT IT CAUSED A PERMANENT TAKING OF THE PROPERTY

In *First English*, this Court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English*, 482 U.S. at 321. In this way, *First English* adopted the principle that

> once a court finds that a police power regulation has effected a "taking," the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 328 (2002) (quoting *San Diego Gas & Electric v. San Diego*, 450 U.S. 621, 658 (1981) (Brennan, J., dissenting). Recently, this Court engaged in an extensive review of *First English* and concluded that "nothing that we say today qualifies its holding." *Tahoe-Sierra*, 535 U.S. at 328.

The lower court has, however, qualified *First English*'s holding to such a degree that compensation for a temporary regulatory taking is logically the constitutional exception, rather than the rule. The vehicle for this regression is *First English*'s brief statement that it did "not deal with the quite different questions that would arise in *the case of normal delays* in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *First English*, 482 U.S. at 321 (emphasis added).

Seizing upon this "normal delay" language, the court below concluded that the City's illegal land use decision could not give rise to a claim for compensation. *Loewenstein*, 103 Cal. App. 4th at 728-29. Central to this conclusion was the court's determination that the "*policy*" under which the City illegally acted was "legitimate." *Id.* at 732. More precisely, because a "reasonable policy" gave rise to the illegal land use restriction, the Loewensteins' loss of all use and value of the property amounted to a noncompensable "normal delay." *Id.* at 736 (resolution of the threshold issue of the legality of the lot-line adjustment was a normal delay in the process of obtaining a permit pertaining to land use).

The court did offer future temporary regulatory takings claimants one slim hope: if an illegal land use decision was guided by an improper motive, such as one made for "no purpose other than to delay the development project before it," compensation might be possible. *See Loewenstein,* 103 Cal. App. 4th at 728, 731, 734-36 ("there is no substantial evidence

to support the conclusion that the City's action was taken for any motive other than carrying out a substantial government interest"). There is nothing, however, in this Court's decisions that comes close to such a requirement. On the contrary, because "'the Constitution measures a taking of property not by what a State says, or by what it intends, but *by what it does*,'" *San Diego Gas & Electric*, 450 U.S. at 652-53 (Brennan, J., dissenting) (quoting *Hughes v. State of Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring)) (emphasis added),[2] the constitutional rule for temporary regulatory taking is simply that just compensation is required when the government goes so far as to cause a regulatory taking that "continue[s] for only a temporary period of time." *Eberle v. Dane County Board of Adjustment*, 595 N.W.2d 730, 737 (Wis. 1999), *accord Stelpflug v. Town Bd., Town of Waukesha, County of Waukesha*, 612 N.W.2d 700, 706 (2000) (following *Eberle* in holding that "temporary condemnation for a public road in this case was sufficient a deprivation of the incidents of ownership to constitute a taking").

First English's "normal delay" language hardly justifies a complete reversal of these principles, and thus the evisceration of *First English* itself. As *Tahoe-Sierra* affirmed, that language simply refers to governmental actions that do not rise to a taking in the first place; i.e., delays in "obtaining building permits, changes in zoning ordinances, variances, and the like." *Tahoe-Sierra*, 535 U.S. at 329. The narrow "normal delay" exception does not eliminate liability for a regulation *already*

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[2] This Court has refrained from looking closely at motive "when addressing whether compensation must be paid" because of the difficulties in discerning regulatory intent and because it "would demand that the Court develop a hierarchy of acceptable governmental motivations." Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev. 1393, 1433 n.97 (1991).

found to cause a taking. When a regulatory taking is found to exist, and the regulatory action causing that taking is either judicially invalidated or rescinded by the government, a compensable temporary taking exists without further inquiry. *See Tahoe-Sierra*, 535 U.S. at 328. But, under the California rule, the court improperly reconsiders whether a taking has occured at all through use of an additional standard: Whether the illegal action was improperly motivated by a desire to delay development. This is the improper analysis that the court below conducted when it determined that the Loewensteins' right to just compensation was voided because the City had legitimate motivations for taking their property.

Under the lower court's decision, even a land use restriction that (1) denies all economically beneficial use of property and (2) is therefore judicially declared to cause a permanent taking if left in place will fall outside the window for temporary regulatory takings compensation. Indeed, if the lower court's rule is correct, many (if not all) of the state decisions that have awarded compensation for temporary regulatory takings since *First English* are wrong because there was no showing of illegitimate motive. *See, e.g.*, *Stelpflug*, 612 N.W.2d at 707-08 (compensation awarded for temporary period when land condemnation rescinded); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994) (invalidated denial of development permit gave rise to claim for compensation under rationale of *First English*).

Unfortunately, the decision below was not an aberration in California, but instead accurately represents views articulated by the California Supreme Court in *Landgate*. *See Loewenstein*, 103 Cal. App. 4th at 736 ("This case fits like a hand in a glove with the rule established by [the California Supreme Court in] *Landgate*.").[3] Thus, even as other state

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[3] Like the decision below, *Landgate* holds that there is no right

(continued...)

courts have severely criticized *Landgate*'s creative use of the "normal delay" language, *see, e.g., Eberle*, 595 N.W.2d at 742 n.25 ("the argument of the majority in *Landgate* was clearly considered and rejected by the United States Supreme Court"), California courts continue to aggressively apply it to deny compensation for even the most textbook temporary regulatory taking. *Accord Lambert v. City and County of San Francisco*, 120 S. Ct. 1549, 1551 (2000) (Scalia, J., dissenting from the denial of certiorari).

"The expansion of the normal delay [statement in *First English*] to include administrative appeals and prolonged litigation . . . seems totally unwarranted. Indeed, this expansion threatens to vitiate *First English*" and the constitutional right to just compensation. Steven J. Eagle, *Just Compensation for Permanent Takings of Temporal Interests*, 10 Fed. Cir. B.J. 485, 501 (2001). It is incumbent upon this Court to remind the states that, until this Court says otherwise, the Just Compensation Clause imposes monetary costs on unconstitutional applications of the government's land use discretion, regardless of whether the government persists with such an application or reverses course when confronted with the illegality of its actions. *See First English*, 482 U.S. at 321.

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[3] (...continued)
to compensation when a court invalidates an illegal government action that prevents all use of property during its effective period unless the underlying decision was "so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project." *See Landgate*, 17 Cal. 4th at 1024.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

DATED: July, 2003.

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